No. 90-549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLIFTON R. WHARTON, JR., ex-Chancellor of the State University of New York, individually and in his official capacity; JOHN MARBURGER, President of the State University of New York at Stony Brook, individually and in his official capacity; HOMER NEAL, Provost of the State University of New York at Stony Brook, individually and in his official capacity; ROBERT NEVILLE, Dean of Humanities and Fine Arts at the State University of New York at Stony Brook, individually and in his official capacity,

Petitioners,

—against—

PROFESSOR ERNEST F. DUBE,

Respondent.

PETITIONERS' RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Petitioners respectfully submit this response to the brief for the United States as *amicus curiae* ("U.S. Br.") which was submitted at the invitation of this Court.

THE PETITION SHOULD BE GRANTED IN ORDER TO RESOLVE CONCLUSIVELY THE CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD THAT MUST BE MET BY PLAINTIFFS ALLEGING MOTIVE-BASED CLAIMS WHERE PUBLIC OFFICIAL DEFENDANTS SEEK SUMMARY JUDGMENT AS TO QUALIFIED IMMUNITY.

Petitioners concur with the United States' view that "the Court of Appeals in this case appears to have allowed the plaintiff to continue the litigation on the basis of the sort of conclusory allegations that the [D.C. Circuit] refused to countenance" in *Siegert v. Gilley*, 895 F.2d 797 (D.C.Cir.), *cert. granted*, 111 S. Ct. 292 (1990). U.S. Br. at 13.[1] Indeed, petitioners submit that it is clear that the court below did *not* "appl[y] the rigorous standard that [the United States] believe[s] the qualified immunity defense requires in determining whether a case should be allowed to proceed." *Id.* Given the manner in which the issues in *Siegert* have now been framed, however, the Court may not reach the more central issue presented here: what sort of evidence is a plaintiff required to adduce, especially after ample opportunity for discovery, to defeat a well-supported summary judgment motion seeking qualified immunity as to motive-based claims.

The Court may reverse in *Siegert* on the sole basis that he should have been permitted limited discovery. Conversely, the United States has asserted that the Court may affirm the lower court's decision in *Siegert* without addressing the question of what standard should apply to the proof presented on

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1 Petitioners are also generally in accord with the United States' statement of the case but note that although the political science department removed Dube's course from its cross-listings (U.S. Br. at 3), the course continued to be listed in the University catalogue and taught by Dube (as AFS 319, rather than AFS/POL 319). (*See* Petition at 6). None of the petitioners was a member of the political science department.

summary judgment.[2] In either event, it will leave unresolved the present conflict among the circuits as to the appropriate standard to apply on summary judgment, particularly where discovery has been allowed.

Significantly, in his Petition for a Writ of Certiorari in *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir. 1989), *opinion amended and rehearing denied*, 906 F.2d 465 (9th Cir. 1990), *petition for cert. filed*, No. 90-660 (October 1990), the Solicitor General urged the Court not to remand for further consideration in light of *Siegert* but rather "to grant the petition in this case and to set the case for argument in tandem with *Siegert* so that the Court can *fully* address the practical problems raised by the litigation of qualified immunity claims." Petition, *Ferrin v. DiMartini*, at 25. (Emphasis supplied). He observed that "[t]he *Siegert* case involves a challenge to the 'heightened pleading standard,' whereas this case involves the adequacy under the summary judgment rule of the plaintiff's proof in support of his allegations," and that both *DiMartini* and *Siegert* "raise oft-recurring questions of considerable practical importance to the disposition of *Bivens* cases." *Id.* The same reasoning is applicable here.

A comparison of the reasoning in *DiMartini* with that in *Martin v. D.C. Metropolitan Police Department*, 812 F.2d 1425, *partially vacated en banc and rehearing granted*, 817 F.2d 144, *reinstated en banc and rehearing denied sub. nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C.

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2 The United States appears to propose a test turning upon whether a plaintiff has set forth "*objective* facts." Brief for the Respondent, *Siegert v. Gilley*, at 20-21 n.13. The manner in which that phrase is defined, however, renders the test somewhat circular. We are instructed, for example, that "the plaintiff must set forth his allegations with sufficient precision and factual specifity to negate the claim of immunity" (*id.* at 17), that the facts alleged must be " 'specific and concrete' and 'raise a genuine issue as to the objective reasonableness' of the defendant's conduct' " (*id.* at 20-21 n.13), and that a "weak circumstantial allegation . . . does not overcome an official's defense of immunity" (*id.* at 27). These formulations, however, are themselves subjective and thus difficult for courts to apply in a consistent fashion.

Cir. 1987), starkly underscores the existing conflict. In *DiMartini*, for example, the Ninth Circuit posits that on motions for summary judgment as to qualified immunity "a greater tolerance of speculation and inference must be afforded." 889 F.2d at 927. In *Martin*, conversely, the D.C. Circuit insists that the "plaintiff . . . come forward with something more than inferential or circumstantial support for his allegations of unconstitutional motive." 812 F.2d at 1435. While *Martin* proposes a standard more demanding of plaintiffs in qualified immunity cases (*id.*), *DiMartini* proposes precisely the opposite—a relaxation of the standards which would otherwise apply to plaintiffs in such cases. 889 F.2d at 926-27.

Of the three cases now before the Court on the issue of qualified immunity standards, only the petition here proposes adopting the summary judgment standards applied by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and other antitrust cases. The *Matsushita* standard would be clear and easy to apply. Unlike the solution proposed by the United States in *Siegert* (*see* note 2 above) the *Matsushita* test looks to the function of the evidence offered, not its quantity or its "strength." If the evidence addresses and tends to exclude the explanation offered by a defendant for his actions, it meets the plaintiff's burden. If it merely offers an alternative hypothesis for that conduct, without attacking the factual basis for defendant's hypothesis, it is inadequate to withstand summary judgment. This test would ensure a more uniform application of qualified immunity standards while vindicating the interests the Solicitor General seeks to protect.

By hearing all three cases, the Court would be presented with an opportunity to deal with the substantial questions presented in these cases in a comprehensive fashion. Accordingly, petitioners respectfully request that the Court grant their petition and set the case for argument.

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Respectfully submitted,

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